IN RE ARBITRATION BETWEEN:

AMALGAMATED TRANSIT UNION, LOCAL 1005

and

METRO TRANSIT

DECISION AND AWARD OF ARBITRATOR
BMS CASE #15-PA-0631

JEFFREY W. JACOBS

ARBITRATOR

February 23, 2016

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Amalgamated Transit Union, Local 1005,

and

Metro Transit.

DECISION AND AWARD OF ARBITRATOR
BMS Case # 15-PA-0631
Shirrell Johnson grievance

APPEARANCES:

FOR THE UNION:

Tim Louris, Attorney for the Union
Shirrell Johnson, grievant
John Zapata, Union Recording Sec'y
Dorothy Maki-Green, ATU Vice President

FOR THE METROPOLITAN COUNCIL:

Andrew Parker, Attorney for the Employer
Mark Kitzerow, Safety Specialist
Christy Bailey, Dir. Of Bus Operations

PRELIMINARY STATEMENT

The hearing in the above matter was held on December 17, 2015 and February 1, 2016 at 9:00 a.m. at 340 Broadway, St. Paul, MN. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties waived post hearing briefs.

ISSUE PRESENTED

There were two cases consolidated for hearing. Was there just cause for the termination of the grievant? If not what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from August 1, 2012 to July 31, 2015. Article 5 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5 – GRIEVANCE PROCEDURE

Section 1 - Metro Transit reserves to itself, and this Agreement shall not be construed as in any way interfering with or limiting, its right to discipline its employees, Metro Transit agrees that such discipline shall be just and merited.

POSITIONS OF THE PARTIES

EMPLOYER'S POSITION

The employer's position was that there was just cause for the termination in this matter. In support of this position the employer made the following contentions.

1. The employer asserted that the primary mission and focus of Metro Transit operations in the safety of the public. This is stated in virtually every training session and video it has and it drums this central mission into the drivers routinely. The employer noted that it has an exemplary safety record even though it operates approximately 31 million miles per year with its transit operations. It works extremely hard to maintain that safety record to maintain the public trust in the safety of its mass transit operations.

2. The employer noted that the clear policy is that a driver is discharged if there are four chargeable accidents within a 36 month period. See Appendix B to Employer Exhibit 34. Here there were four such accidents in a 27 month period, with three of them occurring in only a 14 month period. The employer noted that the first two of these four incidents were not grieved and that the grievant acknowledged her responsibility for the first two. The employer asserted that the grievant has had fur chargeable accidents in a 27 month period. She was given training and coaching on proper driving technique on a regular basis following each of the first three chargeable accidents, including a winter driving video (which becomes important regarding the 4th such accident in this matter) Thus, the employer argued that the action was just and merited in every respect.

3. The employer noted that the first two chargeable accidents involved the grievant's failure to maintain a proper lookout and striking fixed objects causing damage. See, Employer Exhibits 4 and 5. Neither of these crashes was grieved and are part of the grievant's overall record. The employer also noted that in both the prior two instances referenced in Employer Exhibits 4 and 5, the grievant failed to maintain an appropriate safety cushion or a proper lookout and hit fixed objects.

4. The employer went through the extensive training that the grievant received as well as the documentation provided as part of her training to obtain her commercial driver's license, CDL. In all of those, the employer noted that there is a constant theme to not assume things about what other driver's will do. The grievant violated this very clear rule and assumed the other driver was yielding yet she failed to check her mirrors, which would have taken a mere instant, to make certain the van was out of the way.

5. The employer further noted that despite state law requiring driver's to yield to buses leaving stops and the placards on the rear end of many buses admonishing driver's to do so, the training and the clear message is that Metro Transit drivers must yield to traffic in the travel lanes before simply barging in.

6. The employer also maintained generally that the grievant acknowledged this in her testimony as well as in the training that she received and signed for on a regular basis. The employer argued that there is no question that the grievant knew the rule yet, as it argued in the third chargeable accident here, simply chose to ignore it.

7. The employer asserted that this "four chargeable accidents in 36 months" rule is well known and has been arbitrated repeatedly by the parties. The employer noted that the union has tried in the past to assail this rule without success and that in the past 15 cases involving driver accidents the employer has won all of them.

8. The employer noted that the sole exception involved a case of a LRT operator who hit a pedestrian who suddenly and completely unexpectedly darted out in front of the train, leaving no time to react or stop the train. The employer argued most strenuously that the Skrypek case, BMS 15-PA-0418 (Vernon 20015) is entirely distinguishable from this one. As discussed below, both crashes at issue in this matter involved known hazards that the grievant simply ignored or failed to look out for.

9. The employer's witnesses provided definition of what a "chargeable" accident is and described them as "preventable." See Employer Exhibit 1. Here too the employer noted that the grievant admitted that she "could have done things differently," or words to that effect in each of the latter two disputed incidents. This candid admission can thus only mean that the grievant knew she could have prevented these accidents had she been more careful and followed her explicit training, discussed more below, and followed the rules as taught to her by Metro Transit.

10. The employer asserted that the overwhelming evidence shown on the videos from the grievant's bus in each of the last two supports the discharge. The employer also asserted that its safety review committee reviewed the reports and videos of the accidents and concluded that they were clearly chargeable. The employer asserted too that this was done in an unbiased and objective manner and that there was no effort to fire this particular grievant.

11. The employer spent considerable time reviewing the bus videos of the third accident, which occurred on August 29, 2014 while the grievant was leaving a stop along Nicollet Avenue. As will be discussed in more detail below, the employer went through the video immediately before and after the crash in that instance and noted a number of policy violations the grievant committed, all of which conspired to cause the accident.

12. The employer noted that the grievant improperly left the stop on Nicollet Avenue and crept forward well into the crosswalk area of the intersection. In so doing she failed to keep a proper safety cushion around her which the employer asserted greatly increased the chances of a mishap and left her few options in the event the other drivers did not do exactly what she assumed they would do.

13. The employer went through the video in painstaking fashion and noted that the grievant moved her bus in an aggressive fashion and began anticipating the light at that intersection. She began moving even before the light turned green and was quite obviously trying to "beat" the car that was right next to her through the intersection – which was also a clear violation of the training and rules she was taught to yield to traffic and not enter an occupied lane of traffic until that lane had cleared.

14. The employer maintained that the overall record demonstrates that the grievant is an aggressive driver and that her actions in driving in that manner and against many of the safety keys training she has received caused this accident.

15. The employer further noted that the video clearly shows, and that the grievant acknowledged that as she was stopped at the intersection that day a van drove up right next to her and that she saw that van. The van was a mere few feet from her left shoulder. The employer further argued most strenuously that the "pause" the grievant claimed that driver made was not a pause at all but was rather the grievant leaving the intersection early, i.e. before the light changed. Further, the van is seen leaving as well and never lags behind more than the first or second window of the left side of the grievant's bus – about 1/3 of the way from the front of the bus. The grievant never re-checked to make sure the lane was clear even though she knew that van was there. She "assumed' the van would let her in. That assumption was contrary to virtually all of her training not to do so and to check to make sure the lane is clear before barging into it.

16. The employer maintained throughout the discussion of this accident that the grievant could clearly have avoided it by simply waiting until the van cleared the intersection but instead drove even more aggressively trying to race it through the intersection and then moved into the van without checking to see that it was there.

17. The employer countered the claim that the grievant followed protocol by checking her mirrors every 5-8 seconds and moving her eyes every 2 seconds by noting that there was a period of some 4 to 6 seconds between the time she saw the van right next to her and when the accident occurred. Protocol and good driving practice requires that the grievant should have checked before moving into that lane to make sure it was clear and not assume that the van had lagged behind her bus to allow her to merge.

18. The employer also argued that the grievant's aggressive nature was shown by her actions immediately after the accident by angrily confronting the other driver as shown on the video. The other driver was an elderly lady who said "I'm sorry" but that did not necessarily imply or prove fault for the accident.

19. The employer also noted, as discussed below, that "fault" for the accident does not alleviate the driver from following the clear directives given in training over and over – to yield to traffic before moving over and causing a crash.

20. The employer argued that this accident was not a close call and that following a thorough and objective investigation by trained management personnel who were familiar with bus operations, it was determined that this was a chargeable accident.

21. The employer then focused on the 4th accident, which then led to discharge. The employer argued here simply that the video shows the grievant again driving in a somewhat reckless and aggressive manner and too fast for conditions. The accident occurred on snowy roads and showed that the grievant rear-ended another bus at a stop nearly causing personal injury to passengers on both buses, including a mother and small child alighting the other bus at the precise instant of impact.

22. The employer argued that the grievant was driving too fast for conditions, did not slow down in time even though she claimed that she had been having trouble stopping all day. The employer also noted that the grievant admitted that she would do things differently in this instance again if she had it to do over again and argued that this too shows that she violated several rules and good driving habits and caused the accident.

23. The employer argued too that it is hard to imagine how rear-ending a bus that was stopped was not a chargeable accident and further argued that the winter driving video and winter driving training makes it clear that snowy roads are not an excuse for driving too fast for conditions and failing to maintain proper control of a bus.

24. Further, the roads conditions that day were not so bad as to excuse the grievant's actions. There was snow and ice on the roads but 18 other buses entered that very same stop in the hour before and after the accident here without incident. The only reasonable conclusion is that the grievant was driving too fast and did not apply her brakes in time.

25. The video was again painstakingly reviewed and the employer argued that it shows the grievant maintained her speed to within 77 feet or so of the back of the other bus – far too long to stop safely – especially if she had been having trouble stopping in other similar conditions.

26. Further, the employer noted that the grievant made a comment to the street supervisor that she thought the other bus would move. This was again a very telling comment and showed that the grievant was again assuming things would happen that didn't. Moreover, the bus is shown on the video with both of its flashers lit, which means that the bus is stopped and not ready to move. The grievant made yet another invalid assumption which again caused a crash.

27. The employer maintained throughout that it thoroughly investigated both of these mishaps and concluded that the accidents were preventable and that the grievant's actions caused them. The employer asserted that only if the evidence shows that the employer acted unreasonably in calling these accidents chargeable can the union's claim be given merit.

28. Here, the employer argued, the employer was objective and thorough in determining the chargeability of these two accidents and there was no evidence of any bias toward the grievant in any way. The employer maintain that neither of these cases is "close."

29. Finally, the employer cited some 15 cases involving very similar sorts of mishaps and claims by the union, all of which were decided in the employer's favor. These cases show that the rule has been upheld and that the fact that other drivers were partially at fault did not alleviate the driver's responsibility for the accidents involved in those cases. The employer argued that while each case is different, this precedent amply supports its action here.

30. The employer argued too that the grievant's 13 year history was taken into account but that there were not mitigating factors sufficient to change the result. The employer has taken such factors into account in other cases but found no such issues here. When there are four chargeable accidents in a 36 month period, the rule is clear and has been applied to other drivers with much greater seniority, even up to 30 years of experience. The employer argued that safety of the public is of the utmost importance and that drivers and the union know this. To rule in the union's favor would be an anomaly and would undermine the longstanding efforts to train and employ safe drivers.

The employer seeks an award denying the grievance and upholding the termination.

UNION'S POSITION:

The union's position is that there was not just cause for the suspension or the termination. In support of this position the union made the following contentions:

1. The union maintained that the grievant is a 13-year employee with an otherwise excellent driving record except for these most recent incidents. The union objected to any reference to her attendance record since that was not the basis of the employer's actions here. The union argued that the grievant's record should have been taken into account as a mitigating factor but was not.

2. The union also maintained that the grievant immediately owned up to the first two chargeable accidents and took responsibility for those. The first chargeable accident at issue here involved a rear end collision with another vehicle while leaving a bus stop. The grievant took responsibility and indicated that she would drive more carefully in the future when leaving bus stops.

3. With respect to the second chargeable accident, the grievant simply misjudged the space needed to clear a vehicle that was parked too far from the curb while making a turn and she clipped the side of it. The grievant also took responsibility for that and noted that if she feels she does something incorrectly she will take responsibility and be honest. However the union asserted that when other drivers are at fault, such as in the 3rd accident here, she should not be held responsible.

4. Likewise, she should not be held responsible for defective equipment and adverse road conditions causing a crash that was beyond her ability to control. The union assailed the Taply test done on the brakes and tires of this bus and raised the issue that they may well have tested the brakes and tires on dry pavement, which of course would not duplicate the conditions the grievant face on the day in question. Those conditions were undeniably treacherous and icy.

5. The union also spent considerable time reviewing the video of the August 29, 2014 incident and argued that the other driver was entirely at fault for the collision and failed to yield to a bus leaving a stop. The union argued that the other driver was clearly not paying attention to a bus that was exiting a stop only a few feet from the front fender of her vehcle, failed to comply with state law and gave every indication that she would yield to the bus yet sped up and crashed into it.

6. The union argued that the grievant was involved in an almost identical accident only a few days prior to the August 29th incident when a driver did the exact same thing – i.e. moved into the grievant's bus and failed to yield to it. The employer did not charge the grievant with that accident and should not have charged her with this one either as they involved eerily similar facts

7. The union argued that the grievant did not "race' the van out of the stop on Nicollet Avenue, to the contrary of the employer's assertion. Further, even though she left the stop before the light changed, there were no passengers waiting to get on the bus and no one in the crosswalk. She thus felt that it was safe to creep forward a bit in order to leave the stop.

8. The union pointed to the specific rules of the applicable policies that allow, even require, that if there is no traffic a driver can "go." See Employer Exhibit 7. The grievant justifiably assumed that the van driver was allowing her to go and that along Nicollet Avenue when the opportunity presents itself, drivers take the opening in order to get out into traffic. The union asserted that the grievant was doing nothing more than following that rule and relying on her experience as a driver for 13 years, especially along a busy route like this one to get into traffic.

9. The union also noted that the grievant complied with safety keys training and in fact did move her eyes every two seconds and checked her mirrors every 5-8 second – just as the policy requires. She should not be punished for following the policy.

10. The union argued that the van driver hesitated as the bus left the stop, which is a clear sign in south Minneapolis along Nicollet Avenue, that the van was yielding. The grievant was thus more than justified in assuming that the van had yielded and would continue to yield to allow the bus to enter the travel lane – just as state law and the placards on the rear of the bus require.

11. The union asserted that it is well known that Nicollet is a busy street with lots of traffic and that if buses waited for all the traffic to clear there are many times when they would never get out of a bus stop. The union further argued that it is well know that the universally accepted "signal" by the vehicles that they will or are about to yield to a bus exiting a stop is to hesitate or pause to send a clear signal to the bus driver that this is what they are doing and allow the bus to enter the travel lane.

12. When the grievant checked her mirror she clearly saw that the van driver was hesitating and dropping back – which the video clearly shows – and was thus justified in assuming the yield. It was not until a few seconds later, that the van driver suddenly and unexpectedly sped up, cutting off the bus and creating a dangerous situation, given that proximity to the parked cars on the other side of the intersection.

13. The union asserted most strenuously that the grievant's actions were not at fault for this accident and that it is likely that if a police officer has seen the failure of the van driver to yield as state law requires, the van driver might well have been ticketed for this clear violation.

14. The union also argued that the driver had many other potential hazards to watch for that day, including cars entering the road from a gas station only a few feet in front of the bus, traffic potentially turning left from the opposite direction and other vehicles who were around her. These drivers are only human and simply cannot have their eyes pointed in all directions all the time.

15. The union assailed the "Monday morning quarterbacking' the employer always does in these types of cases by flyspecking the videos – sometimes one frame at a time over the course of many views and argued that this is an unfair way to assess the driver's actions. The driver does not get the benefits of a rear view mirror in time and the actions must be judged in real time knowing that the driver gets only one chance here. The union argued the grievant was justified in assuming that the van driver would yield to her and had no way of knowing that she would speed up to cut off the bus.

16. The union also argued that the immediate reaction of the other driver in apologizing for her rash and impetuous actions should be taken into account here not only in assessing fault for the accident but also as a mitigating factor in determining whether this action should result in the termination of a 13-year employee.

17. The union cited a recent decision by Arbitrator Vernon exonerating an LRT driver who struck a pedestrian and argued that this case is similar in that the driver here could not anticipate that the van driver in the August incident would give the grievant one indication and then without warning or explanation speed up and hit the side of the bus. It was thus like having a pedestrian dart out from the bushes directly in the path of an oncoming LRT train.

18. With respect to the March 2015 incident, the union argued that the grievant's bus had been malfunctioning all day and explained that calling in to take that bus out of service would have greatly inconvenienced the passengers. This bus was so bad that the grievant was roughly 30 minutes late getting to her layover due to the snowy and icy conditions and the difficulty controlling that bus.

19. The union noted that the bus can be seen sliding through intersections at stop signs despite the grievant's best efforts to stop but that the sudden icy conditions at the bus stop made it impossible for her to stop in time.

20. The union also countered the claim that the grievant was not slowing down based on the sound of the engine. The union introduced a witness who testified that the sound of the engine of a hybrid bus has no relationship, or at least only a tenuous one at best, to the speed of the bus. The engine might be very quiet while the bus is accelerating while the bus could be decelerating or even coming to a complete stop and the engine RPM's might be quite high and the engine quite loud.

21. The union also asserted that the employer again engages in Monday morning quarterbacking and 20-20 hindsight in assessing the preventability of this accident. The union further asserted that the grievant was going well under the posted speed limit and was perhaps traveling at 15-20 miles per hour. The union noted the absurdity of the employer's argument that "had she been going slower the accident could have been avoided." Obviously if she had been going 1 mile per hour the accident would have been avoided but that would have been ridiculous according to the union and shows again that the rear view mirror way of reviewing these cases results in unfair conclusions.

22. Further, the union asserted that the grievant took every precaution to avoid the accident by braking as soon as she felt she needed to given the conditions. Had she braked a mile before the stop she could have avoided the accident but that too would have been absurd.

23. The union further noted that there were 11 chargeable accidents throughout the system on that particular day, which is very high and shows that other drivers were having great difficulty controlling their buses as well. While 18 other buses entered that stop there was no evidence that this exact scenario was repeated – i.e. that another bus was stopped in the stop as well or that the ice was as bad as it was at the very moment.

24. The union also noted that under the employer's stated policy it is quite possible for a driver to have more than 4 accidents over the course of time but as long as those do not all fall within a rolling 3-year period, the driver will not be discharged. The union asserted that there are such drivers in the system who are working and who may be far worse in terms of their overall safety record.

25. The union's case is premised on the claim that there was a pause by the van driver in the first incident that gave the grievant every reason to believe it was safe to move over and that she followed safety key protocols as required by the employer's own policy. Further, that icy conditions caused the accident in March 2015 and the grievant did everything reasonable to stop her bus.

Accordingly the union seeks an award of the arbitrator sustaining the grievance, reinstating the grievant and making the grievant whole in all respects.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

The record in this matter was extensive and involved hours of review of the videos of the incidents as well as the documentation of the training and investigation done after the two incidents at issue in this matter. The grievant is a 13 year employee of Metro Transit. She has her commercial driver's license, CDL and until the incidents at issue in this matter, had two other chargeable accidents within a rolling 36 month period while driving for the employer.

There was some evidence of attendance issues over the course of time but those were not in issue and were not shown to be the basis of the discipline issued in this matter. Accordingly, those issues will not be discussed.

There was clear evidence that the policy in place calls for certain disciplinary consequence for a "chargeable" accident. There was clear evidence that the employer's policy calls for termination of a driver's employment if there are four chargeable accidents in a rolling three-year period.[1] See Employer Exhibit 34 at page 6, which sets for the policy with respect to disciplinary consequences for 4 chargeable accidents in a rolling three-year period.[2]

At issue in this case is the Final Record of Warning for the 3rd accident which occurred on August 29, 2014 involving the collision with the van, and the discharge for the 4th accident, which occurred in March 2015, involving the collision with the parked bus.

The evidence also showed that a chargeable accident is one, which is determined to have been preventable. This will depend upon the facts of each case and as discussed more below, involves the question of whether the employer was reasonable in making that determination in this case.

The evidence also showed that the grievant has two prior accidents that occurred within the rolling three period prior to the March 2015 incident. The first of these involved a rear end collision with another vehicle as the grievant left a stop and misjudged the space between her bus and a parked vehicle. That occurred in December 2012 and the grievant acknowledged her fault in that incident. No grievance was ever filed over that incident.

[1] The evidence showed that it is possible for a driver to have more than 4 chargeable accidents over the course of a career but the policy calls for a review of a rolling 3-year period. There was also evidence that this 3-year period is set forth as a limit in the CBA for a review of prior instances. The arbitral precedent and the clear policy showed that this is the way this policy has been applied and that it has been upheld over the course of time. See cases cited by the employer as referenced below.

[2] That same policy, Procedure 4-7d, Employer Exhibit 34, also provides for managerial discretion, see page 1 and allows for a departure from the disciplinary consequences. Significantly, that policy does not require that a departure be done but allows for it if there are mitigating or aggravating factors present. Here, as discussed herein, there were no aggravating factors but there were also no mitigating factors shown that would compel an arbitral deviation from the clear policy set forth at age 6 of that document.

The second of these involved collision with a parked vehicle as the grievant rounded a curve. She acknowledged that she misjudged where her bus was and struck that parked vehicle. This was determined to be a chargeable accident and was appropriately treated pursuant to the policy. No grievance was filed over this incident either.

Following these the grievant was coached on proper driving techniques and given appropriate retraining. There was no dispute about that on this record. See Employer Exhibit 40 showing the timeline of training given to the grievant over the past several years. She was given Safety Keys training in December 2014, Employer exhibit 22, remedial training in October 2014, See Employer Exhibit 21, remedial training in January 2014, Employer Exhibit 37; winter driving training in January 2012, Employer Exhibit 23, and safety keys training in September 2011, See Employer Exhibit 10.

The grievant has a CDL and received training in order to obtain that license. Relevant to the discussion here were several of the procedures from that training. Overall these showed that the grievant was trained to yield to other drivers and not to assume they will yield even though they are supposed to.

Some examples of this were as follows: Employer Exhibit 13, CDL training manual Section 4.3.3: "wait for the gap to open before leaving the stop. Never assume that other drivers will brake to give you room when you signal or start to pull out." Employer exhibit 14, from the 2005 Model CDL Manual: Section 2.4.2 – Lane Changes. "You need to check your mirrors to make sure no one is alongside you or about to pass you. (It was significant that this statement admonishes the driver not once but twice to check the mirrors). The policy goes on: "Check your mirrors: Before you change lanes to make sure there is enough room. After you have signaled, to check that no one has moved into your blind spot. Right after you start the lane change, to double-check that your path is clear. After you complete the lane change." See also, Employer Exhibit 15 from the same Model CDL Manual, further provides: Section 2.5.1 – "Signal Your Intentions: Other drivers cannot know what you are going to do until you tell them."

In addition to the training the grievant received to get her CDL there was extensive training from the employer on the proper and safe operation of a bus, specifically related to leaving bus stops. These included the following examples: Employer Exhibit 6, "8-Step Bus Stop Procedure – Standards … Check the outside left mirror; put the left turn signal; double check left mirror and left side of the bus; proceed when safe to do so – make sure it is safe to move the bus before you begin to roll." See also, Employer exhibit 7 – SOP - Leaving a Bus Stop. Do this: Proceed if there is **no** traffic on your left. (Emphasis in original). If you can go – go. Pull straight ahead if you can. If you had to wait for traffic on your left." That policy also reminds drivers to check their mirrors to make sure it is safe to leave the stop.

The evidence further showed that state law requires that drivers in the travel lanes of traffic yield to Metro Transit buses as they leave bus stops. There is also a placard on the rear ends of many buses reminding drivers of that responsibility and even of the state statute that requires it. The evidence showed that many drivers do not do so and that the Metro Transit drivers are well aware of the failure of many vehicular drivers to fail to yield to them as they leave stops.

More to the point, there was ample evidence to support the claim that drivers are specifically trained not to assume that other drivers will yield to them as they leave stops and that they must wait until traffic clears before entering a travel lane of traffic. The clear evidence shows that irrespective of the state law, which requires drivers to yield to buses leaving bus stops, Metro Transit drivers are trained and required to wait until that traffic has cleared before entering the travel lane. This is especially true if there is traffic there and the driver is aware of it before pulling the bus forward.

The details of the two accidents involved in this case will be discussed in greater detail below. At this point is was clear that the grievant was involved in a side swipe collision with a van on August 29, 2014 as she left a bus stop along Nicollet Avenue in South Minneapolis. There was no question that there was contact between the grievant's bus and a van driven by an elderly lady that day.

There was also clear evidence that the details of that accident were reviewed by management representatives who viewed the video and the statements of the grievant and the statement provided by a 3rd party witness before making their determination. There was also clear evidence that the employer held an appropriate Loudermill hearing and gave the grievant a chance to explain her actions before issuing the Final Record of Warning for that accident. Finally, there was clear evidence to show that this accident was the third chargeable accident within a 36 month period and that if the accident was chargeable it would have provided grounds for the Final Record of Warning.

There was also evidence that the grievant was involved in a somewhat similar side swipe accident a few days prior to his third accident that was not found to be a chargeable accident. Details on this were somewhat sparse and there was no video of this submitted into evidence but the record showed that the grievant's bus was struck by a vehicle that entered her lane of traffic. The evidence on this record showed that this accident was the opposite of what happened in the August 2014 accident and involved another vehicle entering the lane that the bus controlled and striking the bus.

Contrary to the union's assertion that they almost always find that any such accident is chargeable, the record revealed that this accident was not charged to the grievant and that no discipline was issued to her based on the facts of that particular incident.

The grievant was given additional training and coaching as the result of the third chargeable accident in August 2014. The record revealed that the employer sought to re-train the grievant each time there was a chargeable accident to assure she would drive safely and follow the safety keys and other training for proper and safe driving.

The final accident in this matter occurred on March 2, 2015. The record showed that the roads that day were partially covered with snow and ice and that at times on side roads they were almost completely covered, depending on the road. The video was again reviewed in painstaking detail and showed that at times the bus slide through or coast through intersections but at others was able to come to a complete stop. These issues will be discussed below as well.

The accident occurred at a bus stop when the grievant was unable to stop and struck the rear of another Metro Transit bus that was stopped to allow passengers to get off. The video showed that the grievant was unable to stop, slid on the ice and snow and crashed into the back of the other bus. There were at least two passengers who were on the rear stairway of that bus who were jarred slightly by the impact. There were no injuries reported but there was damage to the grievant's bus.

The employer again engaged in an investigation of this accident and, based on the grievant's claim that her bus was defective, tested the brakes and tires to determine if equipment failure was the cause of this collision. The record showed that the tires and brakes were functioning properly. See employer Exhibit 27 showing that the brakes and tires were tested to determine if they were defective or out of compliance with standards.

The union asserted that the test may have been performed on dry roads, which would skew the results of the test. There was no evidence on that question and no evidence of any defect in the equipment on the bus that would have caused or contributed to the collision. The record further showed that the grievant decelerated her bus only as she neared the other bus and applied her brakes approximately 77 feet from the back of it. There was some evidence to suggest that the grievant began pumping the brakes rather than applying steady pressure to them as is required of ABS brakes.

There was evidence to show that the drivers are trained on the proper use of ABS brakes and are trained to apply stead pressure to them in the event of a skid in order for them to work properly. The evidence further showed that the bus in question had ABS-type brakes.

The union sought to clarify what the grievant may have meant by her statement that she pumped the brakes and asserted that her use of words may have been inaccurate and that she really did apply steady pressure to the brakes. The clear evidence here, including the grievant's statements made immediately following the accident, showed that she was pumping them, not applying steady pressure to them. Whether that actually caused the bus to slide was unknown but what was clear is that it did hit the rear of another bus.

The record also revealed that the employer again determined that the collision was chargeable. Based on the policy set forth above that warranted discharge for four chargeable accidents within a 36 month rolling period, the grievant was discharged.

The matter was appropriately processed through the grievance steps to arbitration. There were no procedural arbitrability issues and the matter was properly before the arbitrator. It is against that very general backdrop that the analysis of the accidents in question proceeds.

TRAINING AND POLICIES IN PLACE

Before turning to the two incidents that were the focus of this matter, it was necessary to examine the training given to the grievant regarding proper and safe operation procedures in leaving bus stops, changing lanes, and winter driving. The employer made much of this and claimed that the training she receive both to obtain her CDL as well as the training on safety keys and safe driving procedures from the employer should have told her to operate her bus very differently from what was shown on the videos. The union claimed that the grievant followed all required procedures to the letter and should not now be punished for doing exactly what was required of her by moving her eyes and checking her mirrors per policy.

The evidence also showed that drivers are taught both in their training for their CDL as well as in ongoing training from the employer, not to assume things without checking. See Employer Exhibits 11 and 12 at paragraph 18, which specifically requires that drivers "yield to vehicles on your left before leaving the curb." Further, Employer Exhibit 17 at paragraph 17 also specifically requires that "although Minnesota law requires operators of other vehicles to yield to a transit bus leaving the curb or authorized shoulder lane, this in no way relieves you of as an operator from your responsibility to check traffic and leave the curb or shoulder only when conditions permit. Our vehicles proceed only when it is safe to do so regardless of the right of way. Whether or not a vehicle has the right of way will not be accepted as an excuse for a collision with a pedestrian, a bicycle rider or another vehicle."

This was particularly important in the August 2014 accident involved in this case as it was clear that the grievant saw the van to her immediate left, pulled forward and assumed without double checking that the van was indeed going to yield and lag far enough behind the bus to allow it to enter the lane of traffic safely.

The evidence also showed that the policies on safety keys and proper and safe driving procedure requires that drivers move their eyes at least every 2 seconds and check their rear view mirrors at least every 5 to 8 seconds to verify what is there. See Employer Exhibit 21. There is nothing to prevent them from doing this more often and the evidence did not establish that drivers who move their eyes every 2 seconds are absolved from the other responsibility of making sure that a travel lane is clear before moving their bus into it. The union relied heavily on this statement and argued that if the driver is moving their eyes and checking their mirrors within the time frames set forth in Exhibit 21 they ought not to be held responsible if another driver does something unexpected.

A review of those procedures revealed that while the driver is required to move their eyes every 2 seconds and check mirrors every 5 to 8 seconds, these are not the only rules to follow. There is also another clear reference to the Smith Driving System and requires that drivers follow the 5 general rules taught to all drivers. These are to "Aim High in Steering, Get the Big Picture, Keep Your Eyes Moving, Leave Yourself an Out and Make Sure They See You." There were also the other clear rules set forth above that are given to all drivers. Significant among these is the clear rule to yield to other drivers if they are in a lane of traffic and not to assume anything without checking.

While not all of these issues were involved in the August 2014 accident, the evidence showed that the grievant did not leave herself an out and simply assumed something without checking, discussed more below. The overall record shows that simply following one of these procedures does not alleviate the driver's responsibility from safely leaving a stop or making sure there is no traffic in a travel lane before entering that lane.

Thus, the mere fact that a driver may move their eyes in accordance with the 2 second and 5-8 second rule does not automatically relieve the driver from the other responsibilities set forth in the Safety Keys and other training materials or from the common sense driving rule applicable to all drivers not to assume a lane is clear without double checking.

The grievant was also trained on winter driving skills over her career. Obviously anyone who has driven in winter conditions in Minnesota knows that roads will be icy and that stopping on snow and ice can be dangerous. Drivers are taught about this and the training showed several important things. See, Employer Exhibit 17, Bus Operators Rule Book and Guide at paragraph 15 specifically discusses ABS type brakes and admonishes drivers not to pump those brakes. Employer Exhibits 11 and 12 at paragraph 19 also discuss winter driving conditions and admonish drivers to "drive according to conditions."

Employer Exhibit 30 and the Winter Driving video were also reviewed. Both have specific instructions on how to drive in winter conditions. Both tell drivers not to assume they can drive in anything or to drive too fast. Exhibit 30 has a very prominent safety notice on the front page that says, "Safety first, schedule second."

The video and the written materials were instructive about how a driver should safely operate a bus in winter conditions. As will be discussed more below, each situation is different and general rules regarding "driving for conditions" are helpful but do not always apply to each situation. A review of each of the incidents is therefore necessary to determine if the grievant in fact was operating safely and whether these two incidents were properly characterized as chargeable accidents.

THE AUGUST 29, 2014 ACCIDENT

The analysis of this necessarily involves a discussion of the video that shows this accident from several different angles. Suffice it to say that the video was reviewed in great detail both at the hearing and during the analysis of this matter in determining whether it was appropriately determined to have been chargeable to the grievant.

The video shows the grievant's bus proceeding on Nicollet Avenue in south Minneapolis. The weather is clear and roads are dry. The bus enters a stop to allow two passengers to board. At the time the grievant's bus is stopped the side view camera shows that there is initially no traffic next to her in the travel lane of Nicollet Avenue. Nicollet is a two lane road at this point with parked cars on both sides of the road and one travel lane in each direction.

The bus stops and allows the passengers to board. The light is initially green in the grievant's direction of travel when she enters the stop but soon turns yellow as the passengers are boarding and then red. The passengers are seen paying their fares and taking seats. The grievant then closes the door of the bus and waits several seconds at the stop. At that point a van is seen pulling up next to her on her left. The video then shows that the van disappears from the side windows of the bus, which shows that the van is immediately next to the driver's window and the grievant's seat. The grievant indicated that she knew that van was there.

The grievant then begins to move the bus forward slightly out of the stop and into the crosswalk area of the intersection. There is no striped or marked crosswalk at this intersection but the bus is clearly seen moving into the area where pedestrians would cross if they had been there.

There is a gas station on the opposite side of the intersection on the grievant's right and there were cars parked just beyond the curb cut for that gas station. These cars were clearly shown on the video and the grievant would thus have known that she has a relatively short distance to pull forward through the intersection before having to stop for the cars parked in the parking lane on the other side.

There is also traffic seen entering the intersection from the left and right with their green light and these vehicles soon clear the intersection. There are no pedestrians seen crossing in front of the grievant's bus so there was no issue with being distracted by any pedestrians or bicyclists.

About half a second prior to the light turning green the grievant again begins to move the bus forward slightly. The grievant was somewhat unclear as to why she did this but the clear inference is that she was trying to get out in front of the van and enter the lane of traffic before the van.

The employer characterized this as “racing” the van out of the intersection and while that may or may not have been completely accurate, there was some merit to that assertion in that the grievant was clearly trying to send a signal to the van driver that she intended to get into the travel lane first.

The video then shows the light turning green and by this time the grievant's bus has already started to move. The side camera video then shows that the van falls slightly back – although it appears that the van moves too but just not as fast as the grievant's bus does. The van never fell farther behind than the first or second window of the bus – meaning that it was about 1/3 of the way back. The employer’s assertion that the van still had control of the travel lane was shown to be accurate.

The grievant asserted that the van “signaled” to her that it was yielding to the bus, as State law requires, and that she was justified in assuming that the van would drop back and allow her to merge in. The union asserted that when drivers do comply with the law and yield to the bus they hesitate, thus signaling to the bus operator that they are yielding and allowing the bus to merge. The grievant argued that she saw the van hesitate and hold back slightly and that this gave her every indication that she could pull into the lane without further checking her mirrors or simply glancing over her shoulder to make sure it was really safe to do so.

Two things are troubling about this assertion. First, as noted above, the overwhelming evidence shows that operators are trained and taught not to assume anything. When moving into a lane of traffic they are to check and double check to make sure it is safe to do so. There is an old adage about “assuming” things and the grievant seems to have fallen victim to that well-worn maxim. Bus operators are rarely if ever safe to assume something without checking. Further, this is a very different situation from the LRT/pedestrian case cited by the union. The LRT operator had no idea the pedestrian would suddenly dart out into the path of the train. Here the van was only a few feet from the bus when they were both stopped at the intersection and the grievant's actions showed that she was trying to get out early to beat the van across the intersection.

Second, and perhaps most telling, the "pause" that the grievant claimed the van made was not truly a pause at all but was related to the bus pulling out before the light changed. This is hardly the sort of indication to a bus operator that the van was going to wait or yield to the bus. While there was no question that the van driver should have yielded the clear training was that the bus operator must yield to traffic that is already there. As the employer asserted, there was nothing in this scenario that justified the bus simply barging into that lane of travel.

The union also noted that the grievant was involved in a very similar collision only few days before where the bus was sideswiped by a vehicle that entered the bus's lane of travel. The evidence here showed that that accident was the polar opposite of what happened in August 2014. The bus in the prior accident had control of the lane and a car moved into it and collided with the bus. Here the van had control of the lane of travel and the bus driver should have yielded to that van and allowed it to move out of the way.

Further, the employer cited a multitude of prior arbitration decisions in support of its case and asserted at even if the driver of the other vehicle is more at fault than the bus operator, the clear rule is that the accident is chargeable. In some the arbitrators found that even where the other driver's actions was "extraordinarily bad" the operator was still found to be responsible for a chargeable accident.

In *Metro Transit and ATU 1005*, BMS 14-PA-1164 (Lundberg 2014) the operator of an LRT train struck a police vehicle that drove right onto the tracks without looking. Because the LRT operator failed to sound the horn or take other measures to alert the driver – a police officer who clearly should have known better– that the train was coming, the accident was found to be chargeable.

This case presents a more compelling case for the employer. While the van driver should have yielded as state law requires her driving actions were not as "extraordinarily bad" as those in the case before Arbitrator Lundberg. Moreover, an LRT operator has few options if there is an obstruction on the tracks. Here the grievant had several options as discussed above; from slowing down or simply waiting for the van to clear or double checking her mirrors.

In *Metro Transit and ATU 1005*, BMS 10-PA-0412 (Beens 2011) the situation was similar in that the driver of another vehicle violated the law that was shown to have contributed to the collision with a Metro Transit vehicle. The arbitrator found the accident to be chargeable. He also discussed at some length the definition of chargeable and preventable and upheld the employer's determinations in that case. His analysis is both sound and supports the conclusion reached here that the accident of August 29, 2014 was chargeable.

The union also asserted that there was a witness that submitted a statement regarding the accident in question. That witness believed that the van driver was negligent and was at fault for the accident. That handwritten statement was reviewed as well but provided very little evidentiary value. Her statement is cursory at best and does not provide details of where this witness was, what she was doing when the collision occurred or what she actually saw. Further, more to the point, as noted, comparative fault is not the issue here. Clearly, the van driver bore some responsibility for this collision but that did not on these facts and on this record alleviate the grievant from taking appropriate action as a profession commercial drive to avoid this collision – which she could have done.

The grievant and union witnesses also claimed that one must be assertive on Nicollet Avenue in order to get out given the one travel lane in each direction with parked cars along the side. They indicated that if one does not get out into traffic a bus might sit there for a long period of time before getting out of a stop. That may be true but the side camera did not show an inordinate amount of traffic next to the grievant's bus at any time during this incident. She could certainly have allowed the van to pull ahead and then wait to merge into traffic behind that van since there were not many other vehicles there. She had room to do that and while this might have cost a few seconds, it would also have prevented this collision.

On this record there was inadequate justification for the assumption that it was safe – the van was there, the grievant knew it, the pause was due to the grievant's actions in leaving the intersection early and she did not double check as she went through the intersection to make sure it was safe.

It was clear from the testimony and the video that as the grievant's bus approaches the parked cars on the other side of the intersection she moves the bus over in a somewhat aggressive fashion and hits the van. The van was no more than 1/3 of the way from the front of the grievant's bus at that point. The grievant simply failed to make sure that there was no vehcle in the lane of traffic.

The union also asserted that there were other hazards the grievant had to be aware of that distracted her. A car is seen pulling out of the gas station as the bus is proceeding across the intersection. The union asserted that this was a clear potential danger that the grievant needed to avoid and that she could not have had her eyes everywhere.

A review of the video however showed that the car does leave the gas station but that in order to avoid it all the grievant would have had to do is slow down slightly to avoid hitting that car. There was no reason she could not have simply looked at the mirror or over her shoulder to see where the van was at that point.

As noted above, the parties spent considerable time going over the video in some detail as did the management personnel who made the decision to list this as a chargeable accident. The overall record supported the employer's assertion that the August 29, 2014 incident was chargeable.

THE MARCH 3, 2015 ACCIDENT

There is a video of this accident as well that the parties again spent considerable time and effort reviewing in great detail. There evidence showed that the roads were partially snow covered but that in some places pavement is shown although it is clearly wet. It should also be noted that the weather that day was cold but not so cold as to warrant black ice, which can be difficult to see and can suddenly cause a vehicle to slide.

The evidence showed that prior to the accident that occurred at a bus stop on Central Avenue in Minneapolis the grievant's bus was not stopping at intersections. The grievant claimed that this was due to defective tires and brakes and that her bus was experiencing mechanical difficulties that caused her to slide into the rear end of another bus.

There were some inconsistencies with this claim. First, the employer conducted a thorough test of the brakes and tires immediately following this accident, which showed no defect in either. Second, there were times when the grievant's bus is shown rolling through stop signs at times when the brakes were not being deployed. Third, the grievant had little difficulty stopping at red light intersections and allowing traffic to clear in front of her. Those intersections were similarly covered with snow and ice yet she had no difficulty stopping at those. It was only at intersections controlled by stop signs that she rolled through them – fortunately with little or no traffic at those intersections.

Further, the testimony that the bus was having difficulty stopping – even if it was partially caused by equipment failure or mechanical defect, (which was not shown to be the case) this would be a double edged sword. If indeed the grievant was having difficulty stopping as she claimed, why then was she not more careful in operating the bus and slowing down even more than she did and allowing more space to stop? This is a rhetorical question but shows the problems with the grievant's claims.

The accident occurred at a bus stop along Central Avenue. The video is quite telling in that it shows the other bus stopped at the stop and that the grievant had several blocks to notice that bus and take appropriate action to avoid it. Much discussion occurred about the speed of the bus immediately prior to the collision. The employer claimed that the engine sound shows that the grievant did not slow her bus much if at all until too late and may have accelerated slightly just before applying the brakes.

The union argued that the engine noise on a hybrid bus is not an accurate measure of the actual speed of the bus itself and that the engine RPM might actually increase even though the bus is decelerating in speed. Frankly based on the engine sound alone it was difficult to tell whether the grievant was applying more power or not. On this record that somewhat esoteric question did not control the result.

The video did not provide completely persuasive evidence in this regard. The engine noise is somewhat difficult to hear to determine if the bus is accelerating or decelerating. What was telling though was the pace at which the bus passed the street lamps on the right side of the road. Checking the pace at which those passed the bus against the second counter on the video shows that indeed the bus did not decelerate until only very near the intersection.[3]

The overall record shows that prior to the collision the grievant was driving somewhat aggressively. Further, even though she claimed that she was travelling only at approximately 15-20 MPH immediately prior to the accident the record supported the claim that she was driving too fast for conditions as she entered the bus stop.

Further, her statement to the street supervisor who appeared a short time after the collision to investigate was also telling. The video shows that the grievant claimed that she thought the other bus would leave. This telling statement creates the inference that she again assumed something would happen that did not – i.e. that the bus would leave and thus allow her space to enter the stop with more space than she actually had.

At the end of the day, there was no evidence of either mechanical failure to some sort of sudden change in road conditions that would give rise to the claim that the grievant had no time to react to it. Quite the contrary; the roads were snowy all day and she was shown to be able to control the bus well enough prior the collision. There was also evidence that some 18 other busses entered that same stop an hour before and an hour after without incident.

[3] There was again some discussion about how many actual feet prior the collision the brakes were applied. That was difficult to determine precisely on this record but at the end of the day the actual number of feet involved one way or the other was not strictly controlling.

Finally, it is hard to claim that a rear end collision with a parked bus that one could see for 2 to 3 blocks would not be a chargeable accident. That was all that really occurred here and the record simply revealed that the grievant was operating too fast or did not brake or slow down in time, slid on ice that was clearly visible and was an obvious and known hazard and struck the rear end of a bus that was stopped at a stop with its flashers on. The record thus showed that this was a chargeable accident.

APPROPRIATENESS OF THE PENALTY

The final decision in any discipline case is the appropriateness of the penalty. The policy in place is quite clear and requires that if there are 4 chargeable accidents in a rolling three-year period the penalty is discharge. There are no stated exceptions for length of service even though length of service can be used to mitigate a discharge in appropriate cases. Further, the policy itself, as noted herein, grants the manager the discretion to reduce a penalty. There was one case where that has been done but the facts there were quite different as explained by Ms. Bailey in her testimony. That case did not control this one nor did it provide an adequate basis to say that her decision was unreasonable.

The remaining question is whether there are mitigating circumstances to warrant a reduction in the penalty. The employer provided testimony that they looked at the overall record, including the 13-year history but determined that there were no mitigating circumstances warranting reduction of the penalty. The employer also provided a number of instances as well as arbitration cases where drivers with far more seniority than this grievant have been terminated under the 4 in 3-year policy.

The union argued that her seniority should count for something and that there are drivers on the premises with far more than 4 chargeable accidents – just not in a three year period. The union essentially argues that there is thus no rational basis to terminate the grievant even if she is found to have 4 chargeable accidents since there are other drivers whose records are far worse.

On this record there was insufficient evidence to support the union's argument in favor of a reduction in the penalty. While all of these accidents were minor in nature and none were shown to involve personal injury or even great damage to any of the vehicles involved – they were all properly characterized as "fender-benders" – they were all found to be appropriately characterized as chargeable. Further, even though there are some drivers with more than 4 chargeable accidents on their records who remain employed, the record showed that the 4 in a rolling 36 month period policy has been applied to drivers with far more seniority than the grievant has and there was no compelling showing of any reason to deviate from the clear and longstanding application of this policy on these facts.

Further, the policy makes no exception for the amount of damage done to the vehicles involved. Thus on this record, the employer established that the discharged was just and merited. The grievance must therefore be denied and the discharge upheld.

AWARD

The grievance is DENIED.

Dated: February 23, 2016

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Jeffrey W. Jacobs, arbitrator